

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CARLOS MANUEL PERALTA SR.,
Petitioner.

No. 2 CA-CR 2019-0250-PR
Filed June 18, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR058181
The Honorable Joan Wagener, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Francisco León, Tucson
By Francisco León
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

BREARCLIFFE, Judge:

¶1 Carlos Peralta Sr. seeks review of the trial court’s ruling summarily dismissing his untimely and successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Peralta has not shown such abuse here.

¶2 Peralta was convicted after a jury trial of eight counts of manslaughter, nine counts of aggravated assault, and one count each of unlawful use of a narcotic drug, aggravated driving with an illegal drug or its metabolite in his body, and leaving an accident causing death or serious physical injury. He was sentenced to concurrent and consecutive prison terms. We affirmed his convictions and sentences on appeal. *State v. Peralta*, No. 2 CA-CR 98-0617 (Ariz. App. June 27, 2000) (mem. decision). He sought and was denied post-conviction relief, and this court denied relief on review. *State v. Peralta*, No. 2 CA-CR 2002-0097-PR (Ariz. App. Sept. 12, 2002) (mem. decision).

¶3 In August 2018, Peralta filed a pro se petition for post-conviction relief, which the trial court allowed to be supplemented by later-retained counsel. In that supplement, Peralta asserted that, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he had not been given notice in the indictment that he could receive consecutive sentences, and that the court instead of a jury found facts “to impose a sentence exceeding the statutory maximum.” He asserted his appellate counsel and first post-conviction counsel had been ineffective in failing to raise these

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

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arguments. Peralta further argued he was entitled to raise these claims in an untimely proceeding because his right to access to legal materials had been violated by the Arizona Department of Corrections, and that his claims constitute “newly discovered evidence” under Rule 32.1(e). The trial court summarily dismissed the petition, concluding that Peralta’s claims were precluded and, in any event, without merit because he could not show resulting prejudice. The court denied Peralta’s motion for rehearing. This petition for review followed.

¶4 On review, Peralta first argues that he “adequately explained” his failure to previously raise his claims of ineffective assistance of counsel and the trial court erred in finding his claims precluded. Peralta’s constitutional claims cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(b)(3)(A). Thus, he is not entitled to raise his claims of ineffective assistance, nor the underlying claims grounded in *Apprendi*.

¶5 Peralta seems to assert he is nonetheless entitled to raise his claims of ineffective assistance pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), because his counsel should have raised these arguments in his first Rule 32 proceeding. But this court has determined that *Martinez* does not allow a claim of ineffective post-conviction counsel for non-pleading defendants like Peralta because he is not entitled to the effective assistance of post-conviction counsel. See *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 3-6 (App. 2013).

¶6 Peralta additionally contends his claims constitute newly discovered evidence under Rule 32.1(e). A claim under Rule 32.1(e) can be raised in an untimely or successive proceeding. Ariz. R. Crim. P. 32.2(b), 32.4(b)(3)(B). But that rule does not encompass newly discovered legal arguments, and is instead limited to “newly discovered material facts” that “probably would have changed the judgment or sentence.” Ariz. R. Crim. P. 32.1(e); see also *State v. Serna*, 167 Ariz. 373, 374 (1991) (describing five elements of cognizable newly discovered evidence claim).

¶7 Additionally, insofar that Peralta asserts he is entitled to raise these claims because the Department of Corrections limited his access to legal materials, no provision of Rule 32 permits the late filing of claims on that basis, and he has cited no Arizona authority allowing such claims. Such a claim is not cognizable under Rule 32 because it does not implicate his convictions or sentences but, rather, concerns only the alleged post-trial denial of his rights. See Ariz. R. Crim. P. 32.1.

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¶8 The trial court did not err in summarily dismissing Peralta's petition. We grant review but deny relief.